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IN THE

Supreme Court of the United States

RICKEY B. BRYANT and BRENDA S. BRYANT, individually and as Guardians ad Litem for CHRYSTAL R. and STEPHANIE WINDHAM BRYANT,
Petitioners,

v.

DELHAIZE AMERICA, INC., formerly known as FOOD LION INC., and THE FOOD LION, INCORPORATED GROUP BENEFIT PLAN,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the federal statute known as COBRA, an employee who stands to lose group health insurance coverage due to the termination of employment is entitled to purchase a temporary continuation of that coverage. The only exception is a termination for "gross misconduct," which is not defined in the statute. The Court of Appeals for the Seventh Circuit has squarely held that failure to perform job duties (as contrasted to acts of "bad faith malfeasance") is not "gross misconduct." The Fourth Circuit reached the opposite result in the decision below, holding that the petitioner's repeated failure to complete assigned tasks was "gross misconduct." Is the Fourth Circuit's interpretation of the COBRA exception for "gross misconduct" legally erroneous?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the following were parties in the Court of Appeals for the Fourth Circuit:

- Scottie Neal Philbeck (another former Food Lion employee) was an appellant. No petition for writ of certiorari is filed with respect to his claims.
- Stephen Bannister (another former Food Lion employee) and his wife, Genevie Bannister, were appellants below. Their claims were resolved by settlement.
- The Profit Sharing Retirement Plan of Food Lion, Incorporated, was an appellee. It has no interest in the only question presented in this petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Rickey B. Bryant and Brenda S. Bryant respectfully petition the Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The court of appeals' decision is not officially reported. It is available at 2001 WL 434566 (April 30, 2001), and is reprinted in the Appendix (App.) at App. 1a-4a. The district court's opinion is reported at 100 F. Supp. 2d 346 (D.S.C. 2000), and is reprinted at App. 5a-64a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on April 30, 2001. The Court has jurisdiction to review that judgment on writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent statutes are provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA"). They are:

29 U.S.C. § 1161. PLANS MUST PROVIDE CONTINUATION COVERAGE TO CERTAIN INDIVIDUALS

(a) In General.—The plan sponsor of each group health plan shall provide, in accordance with this part, that each qualified beneficiary who would lose coverage under the plan as a result of a qualifying event is entitled, under the plan, to elect, within the election period, continuation coverage under the plan.

(b) Exception for Certain Plans.—Subsection (a) shall not apply to any group health plan for any calendar year if all employers maintaining such plan normally employed fewer than 20 employees on a typical business day during the preceding calendar year.

29 U.S.C. § 1163. QUALIFYING EVENT

For purposes of this part, the term "qualifying event" means, with respect to any covered employee, any of the following events which, but for the continuation coverage required under this part, would result in the loss of coverage of a qualified beneficiary:

(1) The death of the covered employee.

(2) The termination (other than by reason of such employee's gross misconduct), or reduction of hours, of the covered employee's employment.

(3) The divorce or legal separation of the covered employee from the employee's spouse.

(4) The covered employee becoming entitled to benefits under title XVIII of the Social Security Act.

(5) A dependent child ceasing to be a dependent child under the generally applicable requirements of the plan.

(6) A proceeding in a case under title II, United States Code, commencing on or after July 1, 1986, with respect to the employer from whose employment the covered employee retired at any time.

* * *

STATEMENT OF THE CASE

Petitioner Rickey Bryant was fired in 1988 from his job as assistant store manager of a Food Lion grocery store in Columbia, South Carolina. The reason given in the contemporaneous notice of termination was "failure to follow supervisor's instructions," with a citation to Food Lion's rule permitting termination for "absolute refusal to comply with the instructions of any supervisor." DX73; Tr. 512, 518, 520. The underlying facts, according to all the evidence, did not include any disrespectful conduct or challenge to authority. The supervisor who was found by the district court to be "solely responsible for Bryant's discharge," App. 28a, testified:

Q. Do you regard yourself as having fired Mr. Bryant for absolutely refusing to follow the instructions of a supervisor?

A. As I said in my deposition, and I think we went over this probably for an hour, Rick was terminated for not doing his job. Rick was a very passive individual when I knew him. He was not one that would jump up and down and say, I'm absolutely not going to take care of that box of damage you've asked me repeatedly to handle [damaged products that had been removed from the sales floor and placed in the stockroom]. That was not Rick's demeanor. He was always professional, always cordial and handled himself, you know, in a good fashion. He just didn't do—so that's why I say he was terminated for not doing his job. Tr. 1151.

When he was fired, Bryant and his family were covered by Food Lion's Group Benefit Plan. That Plan was a "group health plan" subject to the ERISA amendments known as "COBRA." Under COBRA, an employee who was covered by the group health plan (along with any covered dependents) is entitled to purchase continuation coverage for as long as 18 months following the termination of his employment, unless the grounds for termination were "gross misconduct." 29 U.S.C. § 1161, 1163(2). Food Lion determined that Bryant had been fired because of "gross misconduct" and refused to allow him to purchase continuation coverage for himself or his family.

Bryant and his dependents sued Food Lion, asserting two claims: (1) that the true motive for his termination was to prevent him from reaching full vesting in Food Lion's profit sharing plan, in violation of section 510 of ERISA, 29 U.S.C. § 1140, and that the reasons Food Lion stated for his termination were a pretext for that unlawful motive; and

(2) that Food Lion wrongfully denied him the opportunity to purchase COBRA coverage for himself and his family.

After trial, the district court rejected Bryant's claim for wrongful termination under ERISA section 510, finding that his discharge was "based on poor performance":

> I find that Bryant's performance was sufficiently inconsistent as to be deemed "poor." I further find that especially during the months immediately preceding his discharge, he did not carry out his duties as instructed or as expected of an assistant store manager. App. 28a.[1]

Later, in addressing the Bryants' COBRA claim, the district court described Bryant's inconsistent performance and failure to carry out all of his job duties as "refus[ing] to obey direct orders" and "insubordination." The district court reasoned that Bryant "was well aware of the duties and expectations of his job," and continued:

> He had plenty of time, opportunity and assistance from others available to him to accomplish the tasks he was ordered to do . . . [H]is failures to comply with [his supervisors'] instructions were willful and intentional insubordination and constituted absolute refusal to comply with his supervisors' instructions. App. 39a.

In the conclusions of law, the district court elaborated further on the same facts:

> In light of prior warnings about the very conduct for which he was discharged, Bryant's flagrant, repeated insubordination and his position as assistant store manager, the grounds for his termination fit the [gross misconduct] definition. App. 60a.

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[1] The Court of Appeals affirmed the district court's decision on Bryant's wrongful termination claim, and no issue concerning that claim is presented in this petition.

The court of appeals affirmed, saying:

> In light of the district court's findings of fact as to the nature of the conduct involved (which, for example, as to Mr. Bryant, included "flagrant, repeated insubordination" by a managerial employee), this Court is of the opinion that the district court did not err in characterizing such conduct as "gross misconduct" for COBRA purposes.[2] App. 3a-4a.

STATEMENT OF JURISDICTION BELOW

The district court's jurisdiction over the case in the first instance was provided by 29 U.S.C. § 1132(a)(1) and 28 U.S.C. § 1331. Jurisdiction in the Court of Appeals was provided by 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

The court of appeals' decision should be reviewed on a writ of certiorari because its interpretation of the term "gross misconduct" as used in COBRA is in conflict with the interpretation adopted by the Court of Appeals for the Seventh Circuit in *Mlsna v. Unitel Communications, Inc.*, 91 F.3d 876 (7th Cir. 1996), and because the proper interpretation of "gross misconduct" is critical to the accomplishment of Congress's goal in COBRA to give employees the right, at their own expense, to bridge gaps in medical coverage that otherwise result from the loss of their jobs.

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[2] Despite the Court's use of the phrase "for example" in referring to Bryant's COBRA claim, Bryant was the only person before the Fourth Circuit with any claim concerning COBRA. Another COBRA claim based on a finding of "gross misconduct" had been briefed for Stephen Bannister, but his claims were resolved by settlement before oral argument.

Introduction

This Court has described the COBRA amendments as follows:

> The amendments to ERISA require an employer who sponsors a group health plan to give the plan's "qualified beneficiaries" the opportunity to elect "continuation coverage" under the plan when the beneficiaries might otherwise lose coverage upon the occurrence of certain "qualifying events," including the death of the covered employee, the termination of the covered employee's employment (except in cases of gross misconduct), and divorce or legal separation from the covered employee.

Geissal v. Moore Medical Corp., 524 U.S. 74, 80 (1998). This coverage is not a handout. "The beneficiary who makes the election must pay for what he gets, however, up to 102 percent of the 'applicable premium' for the first 18 months of continuation coverage, and up to 150 percent thereafter." *Id.*

The impetus for the enactment of COBRA was a concern over the "growing number of Americans without any health insurance coverage and the decreasing willingness of our Nation's hospitals to provide care to those who cannot afford to pay." H.R. Rep. No. 99-241 at 44 (1985), reprinted in 1986 U.S.C.C.A.N 622. Addressing part of that problem, Congress gave employees and dependents who are covered by employer-sponsored group health plans the right to continue that coverage, at their own expense, when they otherwise would lose their coverage due to such events as the employee's termination or death, and divorce or separation. The coverage is temporary; it aims to bridge the gap until the employee and dependents can obtain group coverage through another job. 131 Cong. Rec. S7035-1 (1985); *Blue Cross & Blue Shield of Texas, Inc. v. Shalala*, 995 F.2d 70, 71 (5th Cir. 1993). Termination for "gross misconduct" is the only exception to this protection.

A. The Court of Appeals' Decision in this Case Conflicts with the Seventh Circuit's Interpretation of Gross Misconduct in *Mlsna*.

In *Mlsna v. Unitel Communications*, the company maintained that its controller was guilty of gross misconduct. The alleged misconduct consisted of neglecting to manage and collect the company's receivables, failing to maintain adequate and up-to-date financial records, including records required by one of the company's lending banks, signing an unfavorable and unauthorized consent to the findings of a state tax audit, submitting unwarranted claims for commissions and advances for other employees, and stealing customer lists and attempting to steal employees when Mlsna decided to leave the company.[3] The court of appeals found that, with the exception of the alleged submission of unwarranted claims for commissions and advances and attempting to steal customer lists and employees, the conduct amounted to "job incompetence" which, even if adequately proved and sufficient to justify discharge, and even though committed by a high-level management employee with critical responsibility for the financial management of the company, did not constitute "gross misconduct" under COBRA. The alleged theft of commissions and customer lists, in contrast, was the type of "bad faith malfeasance" that could constitute gross misconduct, if proved. 91 F.3d at 881-82.

The Fourth Circuit's decision in this case finds "gross misconduct" without any hint of "bad faith malfeasance," but solely on findings of "inconsistent" or "poor" performance—failing to perform job duties despite repeated requests and warnings. The district court applied the label "flagrant, repeated insubordination" to this conduct, but that label could

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[3] The court also noted that he was accused of filing an unfavorable financial statement with Dun & Bradstreet, but held that the company had "utterly failed to substantiate" that allegation. 91 F.3d at 881-82.

not change the underlying facts as described by Food Lion's own evidence and as found by the district court. As the supervisor responsible for the termination plainly stated, "Rick was terminated for not doing his job," p. 4, *supra*; and the district court found that the termination was "based on poor performance," p. 5, *supra*.

The conflict between *Mlsna* and the decision below is plain. The controller in *Mlsna* failed to perform some of the most important responsibilities of financial management—keeping adequate financial records and managing and collecting the company's receivables. Bryant, an assistant store manager, failed to perform some of the tasks that his supervisor directed him to do: taking care of "backstock," moving a box of damaged products in the stock room, and completing an "image wall."[4] Even accepting the district court's finding that Bryant had enough time and resources to complete these tasks and that his failure to do so therefore was deliberate, nothing in this evidence is worse than the failure of the controller in *Mlsna* to perform some of the most fundamental responsibilities of his position—responsibilities of which he unquestionably was aware. Nothing in Bryant's conduct, any more than in Mlsna's, rises to the level of "bad faith malfeasance" that the Seventh Circuit required for gross misconduct.

This conflict alone warrants this Court's review of the Fourth Circuit's decision. We would be remiss, however, in not pointing out that the Fourth Circuit's decision also conflicts with the reported district court decisions defining "gross misconduct" and the one authoritative regulation interpreting that term in a parallel context.

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[4] An "image wall" was a particular method for organizing the stock room for rapid access to fast-selling items. This and the other two job duties mentioned in the text were the only specific duties that the contemporaneous termination notice (cited at p. 3, *supra*) described as having not been performed.

Reported cases in which gross misconduct has been found have been uniformly limited (before the decisions below) to extreme acts of a criminal nature: *Zickafoose v. UB Services*, 23 F. Supp. 2d 652, 656 (S.D.W.Va. 1998)("Plaintiff savagely beat his co-worker," causing multiple fractures); *Collins v. Aggreko, Inc.*, 884 F. Supp. 450, 454 (D. Utah 1995)(plaintiff "drove a company vehicle while drunk," which was "a serious criminal offense"); *Burke v. American Stores Employee Benefit Plan*, 818 F. Supp. 1131, 1136 (N.D. Ill. 1993)(plaintiff—a grocery cashier—redeemed "Turkey Saver stamps" issued by her employer for free turkeys, knowing the stamps had been stolen by a co-worker; the court described her act as "criminal theft"); *Conery v. Bath Assocs.*, 803 F. Supp. 1388, 1396 (N.D. Ind. 1992)("embezzling company funds"); *Karby v. Standard Products Co.*, 1992 WL 333931, at *6 (D.S.C. June 22, 1992)(the plaintiff "made false statements on his conflict of interest disclosures and committed a theft of company property"); *Adkins v. United Int'l Investigative Servs., Inc.*, 1992 U.S. Dist. LEXIS 4719, at *8, *12 (N.D. Cal. March 27, 1992)(security guard deserted his post at military installation, falsified the duty log to collect a second paycheck—"larceny by trick"—and failed to disclose material information to the employer "with the intent to defraud"). A subsequent case found gross misconduct where a flight attendant, knowing passengers were boarding or about to board, provoked a catering employee by throwing an apple and uttering an audible racial epithet, with the result that the catering employee attacked her and passengers had to separate the two women. *Nakisa v. Continental Airlines, Inc.*, No. H-00-090, 2001 U.S. Dist. LEXIS 8952 (S.D. Tex. May 9, 2001).

Where such criminal or quasi-criminal conduct is lacking, gross misconduct has not been found. Thus, in *Paris v. F. Korbel & Bros., Inc.*, 751 F. Supp. 834, 838-39 (N.D. Cal. 1990), the court refused to hold that it was gross misconduct for a trusted "hospitality assistant" to

violate an explicit instruction not to repeat any information she overheard while serving the company's executives. Although the company was legitimately concerned about harm that could be caused by the information she repeated, the court held that, absent an "evil design" to harm the company, she had not committed gross misconduct. *Id.* at 838-39.

The Office of Personnel Management has issued a regulation interpreting a statute parallel to COBRA that provides health-care continuation rights to federal employees. Under the OPM's regulation, "gross misconduct" means "a flagrant and extreme transgression of law or established rule of action for which an employee is separated." 5 C.F.R. § 890.1102.[5]

The decision below thus stands alone in depriving an employee of the opportunity to protect himself and his family from the loss of group health coverage upon being fired for failing to do his job.

B. The statutory question is important and merits granting the writ to resolve the conflict.

Congress "relieve[d] an employer (and plan sponsor) from its obligation to provide continued health care coverage only in very limited circumstances, such as a termination prompted 'by reason of . . . gross misconduct.'" *Kariotis v. Navistar Int'l Transp. Corp.*, 131 F.3d 672, 680 (7th Cir. 1997). The statutory language evidences an intent that the exception be narrow. It does not relieve the employer of its obligation in all cases of termination "for cause," or in all cases of termination for "misconduct," or even in all cases of termination for "deliberate misconduct." The choice of the phrase "gross misconduct" as the sole exception to COBRA rights is a clear reflection of an intent that only employees

[5] The statute that the OPM regulations interpret is 5 U.S.C. § 8905a(b).

terminated for particularly serious infractions should be denied the opportunity to protect themselves and their families with continued medical coverage while they search for another job and fulfill any waiting periods that their new health coverage may require.

More than 80 million American workers are covered by employment-based group health plans and are protected by COBRA.[6] Employment-based group health plans are the principal means by which individuals under the age of 65 can afford medical care in this country. H.R. Rep. No. 104-496, at 74 (1996), reprinted in 1996 U.S.C.C.A.N. 1865.[7] Many employers that provide such plans operate in multiple federal circuits. It is important to have a uniform interpretation of the one exception Congress permitted to employees' rights to purchase continued health coverage when they lose their jobs. Without a uniform interpretation, employees will be unnecessarily deprived of the medical care to which Congress intended them to have access. Without a uniform interpretation, unnecessary litigation also will be generated.

The Court should grant the writ of certiorari in this case to resolve the conflict that the decision below has generated in the interpretation of the key statutory phase "gross

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[6] This number includes only the workers themselves, ages 18 through 64, who work for employers with at least 25 employees. (COBRA covers all businesses with at least 20 employees, 29 U.S.C. § 1161(b), and government employees are covered by parallel requirements in the Public Health Service Act, 42 U.S.C. § 300bb-3, and the statute cited in note 5, *supra*.) Including dependents, over 170 million Americans are covered by employment-based group health plans. The demographic information is drawn from a joint publication of the Bureau of Labor Statistics and Bureau of the Census entitled "Annual Demographic Survey (March Supplement)," Table H101, Health Insurance Coverage Status and Type of Coverage by Selected Characteristics: 1999. It is available at http://ferret.bls.census.gov/macro/03200/health/01_001.htm.

[7] This report is part of the legislative history of the Health Insurance Portability and Accountability Act of 1996, P.L. 104-191.

misconduct," and to clarify for employers and employees, and for the lower courts, that the phrase "gross misconduct" refers only to extreme instances of deliberate malfeasance, and does not include failure to perform a job, even if the failure was repeated and deliberate.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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